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In the Supreme Court of the United States

October Term, 1978

No. 78-138

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

(a) OPINIONS BELOW

The majority opinion of the Supreme Court of Pennsylvania is reported at 386 A.2d 491 (1978). The dissenting opinion of Mr. Justice Manderino is reported at 386 A.2d 494 (1978). The opinions are appended hereto at pages 36 and 43 respectively.

The first opinion in this case by the Commonwealth Court is reported at 28 Pa. Commonwealth Ct. 430, 368 A.2d 909 (1977), and appended hereto at page 28.

(b) GROUNDS OF JURISDICTION

This case arose by appeal to the Commonwealth Court of the Commonwealth of Pennsylvania pursuant to the 72 P.S. §1104 from the various actions of Pennsylvania taxing officials in refusing to allow Appellant a deduction in computing its 1969 corporate net income tax liability for foreign taxes paid in 1969. The Commonwealth Court affirmed the State taxing officials in denying Appellant the foreign tax deduction, in a final order and judgment handed down March 16, 1977.

The decision of the Supreme Court of Pennsylvania, affirming on appeal the decision of the Commonwealth Court, was handed down on April 28, 1978. Appellant filed a timely petition for reargument which was denied by the Supreme Court of Pennsylvania per curiam by judgment entered on May 31, 1978. The notice of appeal to the Supreme Court of the United States was filed on July 11, 1978 in the Commonwealth Court of Pennsylvania.

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(2), this being an appeal which brings into question the Pennsylvania Corporate Net Income Tax Act of May 16, 1935, P.L. 208, §1 et seq., as amended, 72 P.S. 3420(a) et seq., *infra* page 26 (hereinafter referred to as the "Act"), as construed by the Pennsylvania Department of Revenue, on the ground that it is repugnant to the Constitution of the United States. Appellant contended that a construction of the act to deny Appellant

a deduction from gross income for foreign taxes paid in the tax year and claimed as a credit against tax for federal income tax purposes would violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. In addition, the Commonwealth as a matter of policy, deliberately and systematically allowed such a deduction in the same tax year to a large number of corporate taxpayers, like Appellant, while singling out Appellant for denial of the deduction. Both the Commonwealth Court and Supreme Court of Pennsylvania upheld the act so construed and overruled Appellant's objection that the act, and its application to appellant, was repugnant to the Constitution of the United States.

In the following cases, State taxes which were upheld by the State courts were held to be unconstitutional by this Court under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States:

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), reversing Supreme Court of Virginia;

Liggett Co. v. Lee, 288 U.S. 517 (1933), reversing 104 Fla. 609, 141 S. 153;

Steward Dry Goods Co. v. Lewis, 294 U.S. 550, (1935), rehearing denied 295 U.S. 768, reversing 7 Fed. Supp. 438;

Colgate v. Harvey, 296 U.S. 404 (1935), reversing 107 Vt. 28, 175 A. 352;

WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968) reversing 91 N.J. Super. 269, 219 A.2d 893.

In the following cases the discriminatory enforcement of an otherwise valid taxing statute was held to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States:

Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918);

Sioux City Bridge Company v. Dakota County, 260 U.S. 441 (1923).

The relevant portions of the Pennsylvania Corporate Net Income Tax Act are appended hereto at pages 26-27.

(c) QUESTIONS PRESENTED

1. Does a construction of the Pennsylvania Corporate Net Income Tax Act which divides corporations into two classes, (1) those which claim foreign taxes as a deduction for federal income tax purposes and (2) those which, like Appellant, claim foreign taxes as a credit for federal income tax purposes, allowing to the former a deduction for foreign taxes in computing State income tax and denying the same deduction to the latter, contravene the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, when that classification bears no reasonable relation to the privilege of doing business in Pennsylvania for which the tax was levied?

2. Does the conduct of the Bureau of Corporation Taxes of the Pennsylvania Department of Revenue, the Board of Finance and Revenue and the Department of Justice, in systematically and deliberately allowing a deduction for foreign taxes to other corporations similarly situated to Appellant, in that they treated foreign taxes as a credit for federal tax purposes, make the disallowance of the same deduction to Appellant for the same tax year unconstitutional and illegal, being a denial of equal protection under the Fourteenth Amendment of the Constitution of the United States?

(d) STATEMENT OF THE CASE

(i) *Litigation History.* This case is an appeal from the opinion and order of the Supreme Court of Pennsylvania denying Appellant's petition for refund of corporate net income tax paid for the calendar year 1969. The petition for refund was filed by Appellant on May 5, 1972. The Board of Finance and Revenue denied the petition in an order dated August 27, 1975. On appeal the Pennsylvania Commonwealth Court upheld the Board of Finance and Revenue in an order dated February 2, 1977. Exceptions to the order of the Commonwealth Court were filed and dismissed by that Court in its final order dated March 16, 1977. On appeal the Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in an order dated April 28, 1978. Appellant's petition for reargument was filed on May 11, 1978 and was denied by the Supreme Court of Pennsylvania in its final order dated May 31, 1978.

(ii) *Facts.* Appellant is a Pennsylvania corporation engaged in the manufacture and sale of equipment and appliances for the generation, transmission, utilization and control of electricity. Appellant has 69 United States subsidiary corporations in which it owns 100% of the stock. It also owns 50% or more of the stock of 56 foreign corporations.

For the calendar year 1969 Appellant filed a federal consolidated United States corporation income tax return, Form 1120, for itself and all of its qualifying domestic (U.S.) subsidiaries. Under §901 of the Internal Revenue

Code (the "Code"), Appellant claimed a credit against United States income tax due for 1969 for all foreign taxes withheld or paid or deemed to have been paid on foreign income by itself and its subsidiaries. The portion of such credit attributable to foreign taxes withheld or paid by Appellant was $4,193,124.

Appellant timely filed with the Pennsylvania Department of Revenue its corporate net income tax report for the calendar year 1969, Form RCT-101, attaching thereto a Form 1120, United States corporate income tax return, prepared on an unconsolidated basis for Appellant. Appellant did not deduct in these forms the foreign taxes withheld or paid at source on foreign dividends, royalties, interest and other miscellaneous income included in gross income. Settlement on this tax return was made by the Department of Revenue on November 23, 1970, which settlement was approved by the Department of the Auditor General December 17, 1970, and a copy was mailed to Appellant on December 21, 1970.

On March 10, 1972, Peter Capataides, Director, Bureau of Corporation Taxes of the Commonwealth of Pennsylvania, issued "Taxing Memorandum No. 83 on Foreign Tax Credits", to all taxing officers stating:

> "On the basis of recent decisions by the Board of Finance and Revenue foreign tax credits are allowed as a deduction for purposes of computing Pennsylvania corporate net income tax. The deduction would appear on line 2(c) 'other allowable deductions' of the corporate net income tax return.
>
> These foreign tax credits may be taken as a deduction even though for federal tax purposes they

were claimed as a tax credit rather than as a deductible expense."

Following the issuance of Taxing Memorandum No. 83, Appellant on May 5, 1972, timely filed with the Board of Finance and Revenue, Docket No. C-38344, a petition for refund of 1969 corporate net income tax, filing such petition pursuant to the provision of §503 of the Fiscal Code of 1929, P.L. 343 as amended, 72 P.S. of §503. Said petition for refund requested a refund of $194,115.23 based on a deduction of $5,962,633 for foreign taxes withheld or paid or deemed to have been paid on foreign income. As a result of subsequent changes made by the Internal Revenue Service with respect to Appellant's 1969 federal income tax liability, the amount of the deductions claimed by Appellant is as follows:

Foreign Taxes on Dividends	$1,941,467
Foreign Taxes on Royalties	1,955,922
Foreign Taxes on Interest	179,318
Foreign Taxes on Sales and Other Miscellaneous Income	116,417
Total Additional Deduction	$4,193,124

On April 2, 1973, Taxing Memorandum No. 83 was rescinded by a memorandum from the Director of the Bureau of Corporation Taxes to all taxing officers in the Bureau.

The issue of the deductibility of foreign taxes withheld or paid on foreign income in determining taxable income for the purposes of Pennsylvania corporate net income tax where said foreign taxes were claimed by the taxpayer as a credit against income tax liability on a consolidated United States corporation income tax return, was the sole and only issue in the following cases:

Commonwealth of Pennsylvania v. Coca Cola Company, Commonwealth Court of Pennsylvania, Commonwealth Docket:

No. 561, 1973—Calendar Year 12/31/67
No. 562, 1973—Calendar Year 12/31/68
No. 563, 1973—Calendar Year 12/31/69
No. 564, 1973—Calendar Year 12/31/70

Commonwealth of Pennsylvania v. H. J. Heinz Company, Commonwealth Court of Pennsylvania, Commonwealth Docket:

No. 28, 1975—Fiscal Year 4/30/69
No. 29, 1975—Fiscal Year 4/30/70

On May 13, 1975, in the four cases involving Coca Cola Company and on June 30, 1975, in the two cases involving H. J. Heinz Company, stipulations for judgment were entered against the Commonwealth and in favor of the taxpayer. The effect of such stipulations was to allow the taxpayers in these cases the deductions for the foreign taxes withheld or paid on foreign income for Pennsylvania corporate net income tax purposes.

The order of the Board of Finance and Revenue, dated August 27, 1975, as to which Appellant filed its appeal and specification of objections is as follows:

" 'And now to wit August 27, A.D. 1975, after full consideration this Petition is refused.'

Designees for Secretary of Commonwealth and Treasurer dissent."

The order of the Commonwealth Court dated February 2, 1977, is as follows:

> "Now, February 2, 1977, unless exceptions are filed within thirty (30) days of the date hereof, the appeal of Westinghouse Electric Corporation from the denial by the Board of Finance and Revenue of a petition for refund of a portion of Appellant's 1969 corporate net income tax liability as settled and paid is hereby denied and and [sic] the appeal is dismissed."

Exceptions to the order of Commonwealth Court were filed and dismissed by the Court in its order dated March 16, 1977.

Appellant filed its appeal with the Supreme Court of Pennsylvania on March 31, 1977. The Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in an opinion and order filed on April 28, 1978. Appellant's timely petition for reargument was denied in the final order of the Supreme Court of Pennsylvania on May 31, 1978.

Notice of Appeal to the Supreme Court of the United States was duly filed on July 11, 1978.

(iii) *Manner of Raising Federal Questions.* Appellant first raised the federal constitutional questions involved in this case during administrative proceedings and has pursued them in every phase of judicial review. In the petition for refund filed by Appellant with the Board of Finance and Revenue on May 5, 1972, Appellant stated the following:

> "10. Said Settlement and Resettlement are erroneous, illegal and void for the following specific reasons, among others:
>
> (a) Said Settlement and Resettlement and any supposed authority therefor are contrary to the Act of 1935, P.L. 208, as amended, and to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Pennsylvania Constitution.
>
> (b) The Act of 1935, P.L. 208, as amended, insofar as the provisions thereof purport to impose the Corporate Net Income Tax as determined in the instant Settlement and Resettlement, is unconstitutional as applied to the facts in the instant case, being contrary to the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States and contrary to Article I, Section 9, of the Constitution of Pennsylvania.
>
> * * * * * * * *
>
> (f) Said Settlement and Resettlement in any event, are greater than the Corporate Net Income Tax liability imposed against other taxpayers similarly situate for a comparable period of taxation. Hence, said Settlement and Resettlement are contrary to Section 1 of the Fourteenth Amendment to the United States Constitution and Article VIII, Section 1, of the Pennsylvania Constitution."

In appealing to the Pennsylvania Commonwealth Court from the administrative decision of the Board, Appellant included the federal questions in its specification of objection and exceptions.

"c. Said Resettlement and Order have resulted in an arbitrary, excessive and illegal tax, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of Pennsylvania.

d. As a result of announced policy of the Department of Revenue in Taxing Memorandum No. 83 and by deliberate acts of the Department of Justice in entering into Stipulations for Judgment filed with your Honorable Court, corporate taxpayers similarly situate to Appellant have been allowed a deduction for foreign taxes for calendar year 1969. The disallowance of a similar deduction to Appellant produces arbitrary, unjust and unreasonable discrimination against Appellant, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1 of the Constitution of Pennsylvania.

e. The provisions of the Corporate Net Income Tax Act of 1935, P.L. 208, as amended, 72 P.S. §3420(a) et seq. are unconstitutional and void insofar as such provisions authorize said Resettlement and Order, being contrary to the Fourteenth Amendment and Article I, Section 8, clause 3 of the Constitution of the United States and Article I, Section 9 of the Constitution of Pennsylvania."

The Commonwealth Court, erroneously reasoning that the Act imposed the same tax rate upon the same tax base, held that the Act as written did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States. That Court further held that the discriminatory application of the Act to Appellant could not be found to violate the Fourteenth Amendment because no estoppel can be raised against the Commonwealth.

Appellant excepted to the decision on constitutional grounds, but the Commonwealth Court overruled the exceptions and entered a final order in favor of the Commonwealth. On appeal to the Supreme Court of Pennsylvania, Appellant again raised the constitutional questions. The Supreme Court of Pennsylvania agreed with the Commonwealth Court that the Act as written was constitutional because the base and rate of the tax were uniform and that the application to Appellant was not shown to be deliberate, purposeful discrimination.

Appellant petitioned the Supreme Court of Pennsylvania for reargument on several grounds. First, "[a]n option given taxpayers in the Federal tax structure unconstitutionally distorts the income tax liability of Pennsylvania corporations earning foreign income." Second, "a corporation deducting foreign taxes for Federal income tax purposes is taxed at a lower rate than corporations claiming a credit for foreign taxes on a Federal return. Third, the Supreme Court of Pennsylvania misconstrued the process by which other corporations, which, like Appellant, claimed foreign taxes as a credit, were allowed the deduction that was denied to Appellant." The Supreme Court of Pennsylvania nevertheless refused to hear further argument on the issues.

(e) FEDERAL QUESTIONS ARE SUBSTANTIAL

The instant case involves the denial of equal protection of the law to Appellant in two respects. The first is an unconstitutional construction of the Act. The second is the discriminatory enforcement of the Act, as so construed, against Appellant, while other taxpayers similarly situated to Appellant were given the benefit of a constitutional construction.

(i) The Act as construed by the Supreme Court of Pennsylvania violates the Equal Protection Clause because taxpayers, such as Appellant, electing to take a credit for foreign taxes for Federal tax purposes are denied a deduction for such taxes allowed other taxpayers, who do not claim a Federal credit.

The Pennsylvania Corporate Net Income Tax Act provided for the imposition of an annual State excise tax for the privilege of doing business in Pennsylvania, based on taxable income ". . . as returned to and ascertained by the Federal Government . . . ", 72 P.S. 3420(b) (1) (a), received during the tax year. No specific provision was made for the deduction of foreign taxes.

The Internal Revenue Code gives federal taxpayers an option either (1) to take foreign taxes paid as a deduction from gross income to arrive at net income, §164, or (2) to take foreign taxes as a credit against federal tax due on taxable income determined without a deduction for foreign taxes, §901. As construed by the Supreme Court of Pennsylvania, the Act, by using federal taxable

income as the tax base, disallowed a deduction for foreign taxes in determining State tax unless those foreign taxes were claimed as a deduction and not a credit for federal tax purposes.

This construction renders the Act unconstitutional because the corporations, which paid an annual excise tax for the privilege of doing business in Pennsylvania based upon taxable income received during the tax year, would be taxed at different rates or amounts depending upon elections taken under the Federal income tax laws, which elections bear no relation to the privilege exercised during the tax year.

A consideration of a simple case illustrates the obvious discrimination among Pennsylvania corporations if taxpayers such as Appellant are not allowed a deduction for foreign taxes on income in computing net income. Assume corporations A and B are identical Pennsylvania corporations during 1969, but for reasons unrelated to their Pennsylvania franchises, corporation A takes its foreign taxes paid as a deduction for Federal tax purposes and corporation B takes its foreign taxes paid as a credit for Federal tax purposes.

	Corp. A	*Corp. B*
Sales (net)	$5,000,000	$5,000,000
Royalties (Japan)	2,000,000	2,000,000
Gross Income	$7,000,000	$7,000,000
Expenses	3,000,000	3,000,000
Japanese Income Tax on Royalties	200,000	
Net Income	$3,800,000	$4,000,000
CNI Tax	456,000	480,000

Thus, under the Pennsylvania Corporate Net Income Tax Act, Corporation B is clearly discriminated against by the use of Federal taxable income as the sole inquiry in defining net income for State tax purposes. Appellant, like Corporation B has been denied equal protection of the laws.

The Supreme Court of Pennsylvania declared, despite evidence to the contrary, that the Pennsylvania Corporate Net Income Tax Act was constitutional because the tax base and tax rate were uniform. The base used, however, line 28 of the Federal tax return (Form 1120) is a purely artificial one which bears no consistent relationship to the actual income and expenses of the taxable corporations. The use of this artificial base, results in an effective tax rate which is not uniform in relation to the real income or business transactions of the corporations' taxes.

The Opinion of the Supreme Court on this point is overly simplistic, and if unchallenged would allow a State unlimited power to ignore the mandates of the Fourteenth Amendment. The Pennsylvania Supreme Court states:

> "In the case at bar, it is obvious that the Act did not violate the uniformity clause (of the Pennsylvania Constitution) because the Act's tax base, the corporation's 'taxable income . . . (as) ascertained by the Federal Government' for Federal tax purposes applied the 'same . . . unvarying' rate to all corporations."

Such reasoning is deceptive and erroneous. "Taxable income" in the Internal Revenue Code is but one part of a complicated structure used to arrive at a bottom line figure of federal tax liability. The Internal Revenue Code

uses statutory figures of gross income, adjusted gross income, taxable income, credits against tax, and finally a tax figure. To hold that a State may choose one of these dollar amounts on which to levy a privilege tax without further analysis and with impunity is to nullify the guarantees of equal protection. Taken out of context, these statutory figures are meaningless, as the facts of this case show, and a State should not be able to beg the question of equal protection by adopting one of them as a tax base.

This Court has always looked to substance and the practical operation of a State tax statute. It has been stated thus in *American Oil Company v. Neill,* 380 U.S. 451 (1965):

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443-444; Lawrence v. State Tax Comm'n, 286 U.S. 276, 280, and cases cited thereunder. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80."

The practical operation of the tax, its substance, denies the equal protection of the law to Appellant. This Court has consistently declared State taxing statutes which deny equal protection of the law to be unconstitutional.

In *Colgate v. Harvey* (296 U.S. 404, 423), an exemption for interest received on money loaned within

the State from the Vermont Income Tax law was held invalid under the Equal Protection Clause. This Court ruled that classification must rest upon some difference having a fair and substantial relation to the object of the legislation, and then applied the following test:

> " * * * does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? *'Mere* difference is not enough * * * ' "

In *Stewart Dry Goods Co. v. Lewis* (294 U.S. 550), this Court held that the Kentucky adjusted gross sales tax could not be sustained as an excise on the privilege of merchandising, because there was no reasonable relation between the amount of the tax and the value of the privilege so as to justify discrimination between taxpayers.

In *Liggett Co. v. Lee* (288 U.S. 517), a Florida statute which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county was held by this Court to be arbitrary and void, since there was no "reasonable basis for this classification".

In *WHYY, Inc. v. Borough of Glassboro* (393 U.S. 117), this Court held that the taxation of the real property of foreign nonprofit corporations by the State of New Jersey while according an exemption to domestic nonprofit corporations was the denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution.

Thus tested, the construction of the Act by the Supreme Court of Pennsylvania must fall. Corporations having foreign source incomes are taxed differently in Pennsylvania based solely on a factor having no possible relevance to the scope of business activity in Pennsylvania, i.e., how did the taxpayers treat foreign taxes paid on foreign source incomes on its federal income tax return? The taking of a credit as opposed to a deduction on a federal return is not a real and substantial difference having a reasonable relation to the differing State tax results.

(ii) The disallowance of a deduction for foreign taxes paid on foreign income to Appellant when such deduction has been allowed similar taxpayers for the same year denies Appellant equal protection of the law.

This portion of the Jurisdictional Statement is addressed to the serious constitutional questions involved in the arbitrary and capricious manner in which the Commonwealth has proceeded with respect to Appellant as to the substantive issue involved in the deductibility of foreign taxes.

The record in this case shows that a large number of corporate taxpayers like Appellant were, as a matter of announced policy, deliberately and systematically allowed a deduction for foreign taxes in paying Pennsylvania corporate net income tax for 1969, and Appellant was singled out for denial of such deduction.

After Appellant's 1969 corporate net income tax return was filed and settled in 1970 (Stip. 7, R. 20a)

Peter Capataides, Director of the Bureau of Corporation Taxes of the Pennsylvania Department of Revenue, on March 10, 1972, issued Taxing Memorandum No. 83 addressed to all taxing officers in the Department of Revenue (Stip. 10, R. 21a). This memorandum provides as follows:

> "On the basis of *recent decisions by the Board of Finance and Revenue* foreign tax credits are allowed as a deduction for purposes of computing Pennsylvania corporate net income tax. The deduction would appear on line 2(c) 'other allowable deductions' of the corporate net income tax return.
>
> These foreign tax credits may be taken as a deduction even though for federal tax purposes they were claimed as a tax credit rather than as a deductible expense." (Emphasis supplied.)

Thus, the personnel of the Bureau of Corporation Taxes, in thereafter reviewing corporate tax reports and making settlements and resettlements, were on notice that as a matter of Bureau policy, following the mandate of the Board of Finance and Revenue, foreign tax credits were deductible on Line 2(c) of corporate net income tax returns even though the items were taken as a credit for federal income tax purposes. Furthermore, on April 18, 1972, the original memorandum was expanded with further directions to implement the allowance of this deduction. Indeed, Appellant's 1970 corporate net income tax return was settled and resettled in 1972 allowing a deduction for foreign taxes withheld or paid by Appellant with respect to foreign dividends, royalties, interest, sales and other miscellaneous income (Stip. 18, R. 24a).

After the issuance of Taxing Memorandum No. 83 and while it was in effect, Appellant filed its petition for refund of corporate net income tax for 1969 on May 5, 1972, based on the allowance of a deduction to Appellant for foreign taxes paid or withheld on foreign source income.

On April 2, 1973, Taxing Memorandum No. 83 was rescinded, and of course the availability of a deduction for foreign taxes and the propriety of the rescission of Taxing Memorandum No. 83 is now in litigation.

However, in spite of the rescission of Taxing Memorandum No. 83 and the apparent policy change in the Department of Revenue and the Board of Finance and Revenue, two major corporations of comparable size to Appellant doing business in Pennsylvania were granted a deduction for foreign taxes taken as a credit for federal income tax purposes, for taxable years prior to 1972.

Coca Cola Company, by stipulation with the Department of Justice, was allowed the deduction for calendar years 1967 through 1970 by stipulation for judgment filed May 13, 1975 with Commonwealth Court (Stip. 16, R. 23a).

H. J. Heinz Company was allowed the deduction for foreign taxes for its fiscal years ending April 30, 1969 and 1970 by a stipulation for judgment filed June 30, 1975 with Commonwealth Court (Stip. 17, R. 24a).

Thus, the matter stands that the Pennsylvania Board of Finance and Revenue, the Bureau of Corporation Taxes and the Department of Justice administratively allowed, as a matter of announced policy, the deduction of foreign taxes to many taxpayers identically situated to Appellant

for the same year. It is difficult to conceive of a more blatant and appalling discrimination in the administration of an otherwise constitutional taxing statute.

It is an inviolate precept of taxation that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the denial of equal protection of the law with respect to taxation. Taxing statutes denying equal protection of the law consistently have been invalidated by this Court as discussed above.

Uniformity and equal protection with respect to tax statutes involve much more than the enactment of constitutional legislation. Discrimination, with the resulting lack of uniformity and denial of equal protection, can result from the uneven and discriminatory enforcement and administration of an otherwise constitutional tax statute. The effect of such an abuse of power can be more insidious than an unconstitutional statute or regulation. The latter is public for all to evaluate; the former is often unknown to all but a few. Fortunately, in this case, the discriminatory enforcement against Appellant is well documented in the record in this case.

That discriminatory enforcement of an otherwise valid statute renders the levying of a tax unconstitutional is obvious from the statement of the proposition. However, there are numerous cases for support of the proposition.

This Court in construing the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has frequently found discriminatory enforcement to vitiate an otherwise constitutional statute. In *Sioux City Bridge Company v. Dakota County*, 260 U.S. 441

(1923), the taxpayer's bridge was assessed at full market value, whereas other property in the jurisdiction was assessed at substantially less than full value. The lower court held the remedy of the taxpayer to be the exaction of full value by the taxing authority against the other favored taxpayers. This Court stated as follows:

> " . . . This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."

Previously this Court, in the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918), stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, *whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.* And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right

of one taxed upon the full value of his property." (Emphasis supplied.)

If a few taxpayers were inadvertently allowed a deduction for foreign taxes, either rightly or wrongly, as the substantive disposition of this case would determine, Appellant would not complain.

However, Appellant vigorously protests the deliberate, purposeful discrimination in the application of the Act in the determination of Appellant's 1969 corporate net income tax liability. This is not the mere error of a taxing officer. For years prior to 1972, including 1969, corporations similarly situated to Appellant were allowed the deduction by the Pennsylvania Secretary of Revenue, the Auditor General, the State Treasurer, the Secretary of the Commonwealth and the Attorney General, sitting as the Pennsylvania Board of Finance and Revenue, by directive of the Director of the Bureau of Corporation Taxes and by the Attorney General in stipulations of the tax liability of identical taxpayers under the identical circumstances filed within three months of the denial of the same deduction to Appellant by the Board of Finance and Revenue in an order *in which the Secretary of the Commonwealth and the State Treasurer dissented.*

It is difficult to conceive of a more deliberate, purposeful discrimination in the application of a tax. If conduct by State ficsal officers, such as is apparent in the case at hand, is countenanced, the consequences are appalling. The determination of the tax liability of every individual or corporation filing State tax returns will be at the whim and fancy of each and every taxing officer, administrative board or attorney vested with decision-making power in State government. The principles of

equal protection which require the non-discriminatory bearing of the burdens of citizenship, will have been abolished.

For the foregoing reasons, probable jurisdiction should be noted.

(f) SUMMARY

Section 1 of the Fourteenth Amendment to the Constitution of the United States guarantees to the taxpayers of the United States that, as in all matters, no State shall deny to any person within its jurisdiction equal protection of the laws. This fundamental constitutional guarantee, rooted as it is in a basic urge for fair play and equality, should not be eroded or qualified by the subtle distinctions adopted by the Pennsylvania courts to justify the exaction of a greater tax from corporate taxpayers such as Appellant because of an irrelevant election peculiar to federal income taxation.

Nor should State tax officials be allowed to pick and choose at random who gets the benefit of tax deductions, nor to impose a higher burden of tax deliberately on one taxpayer while allowing others favored treatment.

These principles should be reaffirmed in the instant proceeding by the noting of probable jurisdiction and the reversal of the opinion and order of the Supreme Court of Pennsylvania.

Respectfully submitted,
LLOYD R. PERSUN,
HOWELL C. METTE,
SHEARER, METTE AND WOODSIDE,
Attorneys for Appellant

APPENDIX A

RELEVANT PROVISIONS OF THE PENNSYLVANIA CORPORATE NET INCOME TAX ACT

(Act of May 16, 1935, P.L. 208, as reenacted and amended.)

Section 2. Definitions.—The following words, terms, and phrases, when used in this act, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning.

* * * * * * * *

"Net Income." 1. In case the entire business of the corporation is transacted within this Commonwealth,

* * * * * * * *

(b) For any taxable year beginning after the thirty-first day of December, one thousand nine hundred fifty-three, and ending after the fifteenth day of August, one thousand nine hundred fifty-four, except as hereinafter provided in the case of stock life insurance companies taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government, or in the case of a corporation participating or which has participated in prior taxable years in the filing of consolidated returns to the Federal Government the taxable income which would have been returned to and ascertained by the Federal Government if separate tax returns had been made to the Federal Government for all years affected by

the filing of consolidated returns to the Federal Government, subject, however, to any corrections thereof for fraud, evasion or error as finally ascertained by the Federal Government:

* * * * * * * *

Section 3. Imposition of Tax.—Every corporation shall be subject to, and shall pay for the privilege of doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of itself, or any person, partnership, association, limited partnership, joint-stock association, or corporation, a State excise tax at the rate of six per centum per annum upon each dollar of net income of such corporation received by, and accruing to, such corporation during the calendar year one thousand nine hundred thirty-five, except * * * and a similar tax at the rate of twelve per centum per annum upon each dollar of net income of such corporation received by and accruing to such corporation during the calendar years one thousand nine hundred sixty-nine and each year thereafter, * * * .

APPENDIX B

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA
[28 Commonwealth Ct. 430 (1977)]

Opinion by President Judge Bowman, filed February 2, 1977:

These consolidated appeals on stipulated facts present the novel question of whether a corporate taxpayer which elected under 26 U.S.C.A. §33 of the Internal Revenue Code of 1954[1] to take foreign taxes withheld or paid as a credit against federal income tax liability rather than as a deduction from gross income, may subsequently take such foreign taxes as a deduction for purposes of computing tax liability under the Corporate Net Income Tax Act (Act), Act of May 16, 1935, P.L. 208, *as amended*, 72 P.S. §3420a et seq.[2]

Westinghouse Electric Corporation and Rohm and Haas Company (Appellants) are appealing from orders of the Board of Finance and Revenue (Board) dated August 27, 1975, rejecting a petition for refund by Westing-

[1] "The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a credit against the tax imposed by this chapter to the extent provided in Section 901."

[2] Repealed by the Act of March 4, 1971, P.L. 86. *See now* the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, 72 P.S. §7401 et seq.

house for the calendar year 1969 and a petition for refund by Rohm and Haas for the calendar year 1970. For those years, Appellants elected in their consolidated federal returns to take as credits against their federal income tax liability foreign taxes withheld by or paid to foreign governments. 26 U.S.C.A. §33. Appellants then filed their Pennsylvania corporate net income tax returns for those years in which returns said foreign taxes were *not* taken as deductions and Appellants' corporate net income taxes paid accordingly.

Postdating the settlements of Appellants' returns, on March 10, 1972, the director of the Bureau of Corporate Taxes issued Memorandum No. 83 (No. 83) allowing corporate taxpayers to take under the Act as a deduction foreign taxes withheld or paid, notwithstanding how the taxpayer elected to treat them under the IRC.[3]

Claiming the benefits of No. 83, Appellants filed Petitions for Refund.[4] It is from the denial by the Board of these petitions that these appeals have been brought.

Appellants' common contentions may be briefly stated. First, it is argued that the corporate net income tax by the terms of the Act is levied solely upon net income *actually* received by the corporate taxpayer so that foreign taxes withheld or paid are not within the Act's scope. Second, Appellants contend that there is no provision in the Act subject to a construction that would prohibit taking as a deduction foreign taxes employed as a credit for federal purposes. Finally, it is argued by Appellants that

[3] No. 83 was rescinded finally on April 11, 1973.

[4] Westinghouse filed its petition on May 5, 1972. Rohm and Haas did so on September 6, 1973.

their rights under the Uniformity Clause, Pa. Const. art. 8, §1[5] and the Equal Protection Clause of the 14th Amendment have been violated because in *Commonwealth v. Coca Cola Co.*, 561-64 C.D. 1973 and in *Commonwealth v. H. J. Heinz Co.*, 28-29 C.D. 1975, the corporate taxpayers were granted, by means of stipulations for judgment, the deductions which Appellants seek.[6] Appellants invoke these constitutional provisions to further argue that the Board's interpretation and application of the Act discriminates against corporate taxpayers using foreign taxes as credits against their federal income tax liability in favor of those who use them merely as deductions.

We believe all of these contentions to be without merit and shall affirm the orders of the Board.

To dispose of Appellants' first contention, that the Act as written permits the deductions they seek, we must turn to the Act itself.

"Net income" in the case of a corporation filing consolidated federal returns is defined in Section 2 of the Act, 72 P.S. §3420b as "the net income which would have been returned to and ascertained by the Federal Government if separate returns had been made . . . ." The IRC defines taxable (i.e. net) income as gross income less the deductions permitted by Chapter 1 of the IRC other than the standard deduction, 26 U.S.C.A. §63(a). Thus,

[5] "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

[6] Rohm and Haas also relies upon the settlement of Westinghouse's liability for the calendar year 1970 which was settled along these same lines.

the effect of Section 2 of the Act is to incorporate by reference those provisions of the IRC which go toward the computation of taxable income for federal purposes.

Appellants elected under 26 U.S.C.A. §33 to take as credits against their federal income tax liability the foreign taxes in question and were, therefore, precluded from also taking them as deductions under 26 U.S.C.A. §164. *See Bank of America v. United States*, 180 Ct. Cl. 111, 377 F.2d 575 (1967). That they so elected is hardly surprising because it would require a tax rate of 100% to make a deduction as advantageous as a credit. Unfortunately for Appellants' position in these proceedings, however, their elections had the effect of producing taxable income for Federal purposes without regard to foreign taxes paid or withheld and it is this computation which constitutes net income as the tax base for tax purposes under the Act. To allow Appellants to take the deductions they claim would be to ignore the plain language of the Act adopting the computation of taxable income under the IRC as net income under the Act. What was said in *Commonwealth v. Koppers Co.*, 397 Pa. 523, 529, 156 A.2d 328, 332 (1959), is apropos:

> "Highly refined and technical tax concepts have been developed by the . . . legal technician primarily because of the impact of federal income tax legislation. However, this in no way should affect or control the normal usage of words in the construction of our tax statutes . . . ."

Appellants' second and closely related contention, that they are entitled to the deductions because nothing in the Act prohibits them, is without merit for the same reasons. Appellants confuse the rule that where the issue

is whether property is taxable or whether the individual is subject to taxation, all reasonable doubts must be resolved in favor of the taxpayer, *City of Pittsburgh v. WIIC-TV Corp.*, 14 Pa. Commonwealth Ct. 18, 321 A.2d 387 (1974), with the rule that where the power to tax is clear, and the taxpayer is within the taxing statute's general scope, language of exemption and deduction must be strictly construed. *Commonwealth v. Berlo Vending Co.*, 415 Pa. 101, 202 A.2d 94 (1964); *Commonwealth v. Budd Co.*, 379 Pa. 159, 166, 108 A.2d 563, 566, *appeal dismissed*, 349 U.S. 935 (1954); *Commonwealth v. Staley*, 21 Pa. Commonwealth Ct. 193, 344 A.2d 748 (1975); *Harjef's Corp. v. City of Philadelphia Tax Review Board*, 16 Pa. Commonwealth Ct. 63, 329 A.2d 325 (1974). It is, therefore, unimportant that the Act does not expressly prohibit the deductions sought by Appellants. What is decisive is that nothing in the Act permits them and Appellants, having elected to take the foreign taxes as credits, are bound by their choices. *See Bank of America v. United States, supra.* They cannot have the best of both worlds absent clear legislative authority to the contrary.

Finally, we must deal with the constitutional argument that the Act both as written and as applied to Appellants violates the uniformity clause and Appellants' equal protection rights by discriminating against taxpayers electing to take foreign taxes as a credit on their federal returns in favor of those electing to take them as a deduction, and because in two other instances the deductions sought by Appellants were allowed.

Succinctly stated, the uniformity clause and equal protection clause, which stand in pari materia in tax matters, *Commonwealth v. Budd Co.*, supra, require that there be equality of burden upon the classes or things subject to the tax in question. *Commonwealth v. Repplier Coal Co.*, 348 Pa. 372, 35 A.2d 319 (1944). They do not, however, impose an iron-clad rule of equality so as to inhibit flexible and reasonable schemes of taxation, *Commonwealth v. Life Assurance Co. of Pennsylvania*, 419 Pa. 370, 214 A.2d 209 (1965), and only substantial uniformity and approximate equality are required. *Commonwealth v. Budd Co., supra; Mineral Railroad & Mining Co. v. Northumberland County Commissioners (No. 1)*, 229 Pa. 436, 78 A. 991 (1911); *Commonwealth v. Morris Half Hour Laundromat*, 91 Dauph. 157 (1969), *aff'd*, 442 Pa. 543, 277 A.2d 148 (1971).

In this attack upon the Act as written, Appellants bore the heavy burden of proving that it is "clearly, palpably and plainly" violative of either the federal or state constitutions. *Alco Parking Corp. v. Pittsburgh*, 453 Pa. 245, 255, 307 A.2d 851, 857 (1973). This burden which has not been met, is not lightened by the fact that the constitutionality of the Act has been upheld on prior occasions, *Commonwealth v. Budd Co.*, supra.

Where the same rate of taxation is applied to the same tax base, no constitutional infirmity is made out, and no unreasonable classification can be said to exist. *See F. J. Busse Co. v. Pittsburgh*, 443 Pa. 349, 279 A.2d 14 (1971); *Commonwealth v. Repplier Coal Co.*, supra. Here, the Legislature has adopted as the tax base net income as returned to and ascertained by the Federal Government. Section 2 of the Act, 72 P.S. §3420b; *Commonwealth v. Budd Co.*, supra. The same rate of tax is applied to all taxpayers subject to the Act. Section 3

of the Act, 72 P.S. §3420c. How Congress has chosen to compute ultimate Federal tax liability under the IRC, and the elections it has offered to taxpayers are of no consequence under the Act in the context of this litigation, *Commonwealth v. Budd Co.*, supra; and when tax legislation treats all within its scope in a substantially uniform matter, it cannot be said to discriminate because of classifications made by other legislation. *Commonwealth v. Life Assurance Co. of Pennsylvania,* supra.

Appellants also attack the constitutionality of the Act as applied, referring us to the *Coca Cola Co.* and *H. J. Heinz Co.* cases previously described.[7] This contention, too must fail as it seeks to raise an estoppel against the Commonwealth which can not be done under the law of this State. *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 105 A.2d 336 (1954).

Furthermore, Appellants have failed to make out

> "(a) deliberate, purposeful discrimination in the application of the tax . . . . Mere error by a taxing officer in applying a statute which imposes the same tax base and the same rate of tax on all corporations similarly situated does not infringe upon these protections (of uniformity and equal protection)." *Commonwealth v. Koppers Co.*, supra, 397 Pa. at 532, 156 A.2d at 334 (1959).

Rohm and Haas advances the additional argument that it is entitled to a refund based upon a deduction under the act for foreign taxes withheld/paid on foreign divi-

[7] Rohm and Haas refers additionally to Westinghouse's 1970 tax settlement. Note 6 supra.

dends. Because "(t)he refund of taxes voluntarily paid is a matter of legislative grace and not a right", *Hazleton National Bank v. Commonwealth,* 10 Pa. Commonwealth Ct. 366, 370, 308 A.2d 195, 197 (1973), the procedures prescribed for obtaining a refund must be strictly pursued. *Land Holding Corp. v. Board of Finance and Revenue,* 388 Pa. 61, 130 A.2d 700 (1957); *cf. Coshey v. Beal,* —— Pa. Commonwealth Ct. ——, —— A.2d —— (No. 127 C.D. 1976, filed December 9, 1976). Because Rohm and Haas failed to raise this issue in the administrative proceedings below, we are precluded by Section 1104 of The Fiscal Code, Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. §1104, from considering it. *Hazleton National Bank v. Commonwealth,* supra.

(s) James S. Bowman
James S. Bowman,
President Judge

APPENDIX C

MAJORITY OPINION OF PENNSYLVANIA SUPREME COURT

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 131 March Term, 1977

Commonwealth of Pennsylvania

vs.

Westinghouse Electric Corporation,
Appellant

Appeal from the Order and Judgment of the Commonwealth Court at No. 1353 C.D. 1975

OPINION

Larsen, J., filed April 28, 1978:

When appellant, a Pennsylvania corporation, filed its consolidated Federal corporate income tax return for calendar year 1969, it elected to claim the taxes which

it paid to foreign governments as a credit against its Federal tax liability rather than as a deduction from its gross income.[1] Since the Pennsylvania Corporate Net Income Tax Act of May 16, 1935, P.L. 208, §1 et seq. *as amended*, 72 P.S. 3420(a) et seq. (herein referred to as "the Act")[2] provided that a corporation's taxable income (for the purposes of calculating state tax liability) consisted of those funds which the Federal government designated as taxable on the corporation's Federal tax return, appellant, because it did not claim a deduction for foreign taxes on its 1969 Federal return, did not deduct said foreign taxes from its 1969 state return.

On December 17, 1970, appellant and the State Auditor General reached a settlement on appellant's state tax liability for calendar year 1969.

On March 10, 1972, the director of the State Bureau of Corporation Taxes issued a document entitled Taxing Memorandum No. 83 which provided that a corporation, when filing its state tax return, could claim foreign taxes as a deduction from its gross income even though said corporation did not deduct the foreign taxes from its Federal return. Accordingly, on May 5, 1972, appellant filed a petition with the State Board of Finance and Revenue requesting a partial refund of the taxes that appellant paid to the Commonwealth for calendar year 1969. Appellant claimed that it was entitled to this refund since, in determining its state tax liability for calendar year 1969, appellant did not deduct foreign taxes from its gross

[1] This was pursuant to the Internal Revenue Code of 1954, 26 U.S.C.A. §33.

[2] Repealed by the Act of March 4, 1971, P.L. 86, No. 2, art. IV, §411, 72 P.S. §7411.

income as it was permitted to do under Taxing Memorandum No. 83.

The Board of Finance and Revenue denied appellant's petition for a partial refund of its 1969 state taxes. Appellant appealed the Board's decision to the Commonwealth Court, which affirmed the Board's denial of appellant's refund petition. Subsequently, appellant filed this appeal of the Commonwealth Court's decision in this Court.

On April 2, 1973, the director of the Bureau of Corporation Taxes rescinded Taxing Memorandum No. 83.

Appellant's first contention is that since Section 3420(c) of the Act provided that a corporation was required to pay a state excise tax only "upon each dollar of net income . . . *received* by . . . and accruing to" said corporation, appellant was entitled to deduct the foreign taxes because it never "received" the taxes which it paid to foreign governments. Appellant's argument is misplaced since it ignores the Act's definition of "net income"; the Act defines "net income" as the corporation's "taxable income . . . as ascertained by the Federal Government . . . " for Federal tax purposes. 72 P.S. §3420(b) (2) (c).[3] Thus, in determining whether appellant's foreign taxes should be considered as part of "net income" (and hence subject to the state corporate net income tax); our sole inquiry is whether the amount of said foreign taxes was included as "taxable income" on appellant's Federal return. By

[3] This Court approved this definition of "net income" in *Commonwealth v. Budd Co.*, 379 Pa. 159, 167, 108 A.2d 563, 566 (1954).

not claiming a Federal tax deduction for the foreign taxes, appellant treated the amount of those taxes as included within the figure which comprised "taxable income" on its Federal return; accordingly, the amount of foreign taxes paid by the taxpayer must be treated as included within the amount to be shown as "net income" on appellant's state tax return.

Appellant's second contention is that the Commonwealth's refusal to partially refund the taxes which appellant paid for calendar year 1969 violated appellant's rights under the equal protection clause of the United States Constitution and the uniformity clause of the Pennsylvania Constitution. The basis for appellant's argument is that appellant, by not being permitted to deduct foreign taxes from its state tax return, was taxed at a higher rate than those corporations which were allowed to deduct foreign taxes from their state tax returns.

In the past, this Court has held that in matters of taxation, allegations of violations of the equal protection clause and the uniformity clause are analyzed in the same manner. *Fisher Controls Co. v. Commonwealth of Pennsylvania,* —— Pa. ——, 381 A.2d 1253, 1256 (1977). Further, this Court has held that a state tax is not violative of the uniformity clause if the tax "applies to all corporations with which the Commonwealth has power constitutionally to deal . . . . Where the (state tax) base is the same and the rate unvarying, there is no lack of uniformity." *Commonwealth v. Warner Brothers Theatres, Inc.*, 345 Pa. 270, 274, 27 A.2d 62, 64 (1942). In the case at bar, it is obvious that the Act did not violate the uniformity clause because the Act's tax base, the corporation's "taxable income . . . (as) as-

certained by the Federal Government" for Federal tax purposes, applied the "same . . . unvarying" rate to all corporations.

Further, the sole reason that appellant paid more taxes than those corporations which were permitted to deduct foreign taxes from their state tax returns was that unlike those other corporations, appellant chose to claim the foreign taxes as a credit against Federal tax liability rather than as Federal tax deduction from its gross income and, thus, appellant was not entitled to deduct the foreign taxes from its gross income on its state return. Appellant's election of claiming the foreign taxes as a credit rather than as a deduction on its Federal tax return was voluntary.

Appellant's third contention is that the equal protection and uniformity clauses were violated by the Commonwealth because appellant, unlike corporations who settled their state tax liabilities while Taxing Memorandum No. 83 was in effect, was not permitted to deduct said foreign taxes from its state return. "A taxpayer complaining that administration of a tax violates its rights to be taxed uniformly with others in its class must demonstrate *deliberate, purposeful discrimination* in the application of the tax . . . before constitutional safeguards are violated. . . . (An) appellant has the burden of proof of showing the discriminatory pattern which might entitle him to relief: the validity of actions of taxing authorities is presumed; when assailed, the burden of proof is upon the complaining party." *Fisher Controls, supra.* (Citations omitted) (Emphasis added).

In the case at bar, appellant does not challenge the Commonwealth's assertion that the policy enunciated in

Taxing Memorandum No. 83 was applied uniformly during the period of time that the Memorandum was in effect. Further, appellant has offered no evidence that the director of the State Bureau of Corporation Taxes acted in bad faith or had any purpose which could be considered fraudulent. Viewed in the worst light, Taxing Memorandum No. 83 was no more than a mistake which was corrected by the director when he rescinded the Memorandum after it was in operation for thirteen months. Clearly, appellant has not met its burden of proving "deliberate, purposeful discrimination" by the Commonwealth in enforcing the Act.

Appellant's fourth contention is similar to its third in that appellant alleges that the Commonwealth violated the equal protection and uniformity clauses since, subsequent to the rescission of Taxing Memorandum No. 83, two major corporations of comparable size to appellant were granted a deduction on their state returns for foreign taxes that were claimed as a credit on their Federal returns. In positing this argument, appellant ignores the fact that the two corporations received their deductions as part of out-of-court settlements reached between the Commonwealth and the corporations. Under Section 3420(h) of the Act, the Commonwealth had the power to enter such tax settlements with corporations.

Even if the Commonwealth erred in allowing the two corporations to deduct the foreign taxes, these isolated instances of taxpayers receiving deductions through the mistakes of the Commonwealth's employees should not serve as a justification for this Court's extension of relief and further mistake to appellant. The fact remains that "no errors or misinformation of (the Commonwealth's)

officers or agents can estop the government from collecting taxes legally due". *Commonwealth vs. Western Maryland Railway,* 377 Pa. 312, 321, 105 A.2d 336, 341 (1954). Moreover, appellant failed to meet its burden of proving that the Commonwealth deliberately and purposefully discriminated against appellant.

The order of the Commonwealth Court is affirmed.

Mr. Justice Roberts and Mr. Justice Nix concurred in the result.

Mr. Justice Manderino filed a Dissenting Opinion.

APPENDIX D

DISSENTING OPINION BY MR. JUSTICE MANDERINO

[Caption Omitted]

DISSENTING OPINION

Justice Manderino:

I dissent. The law of Pennsylvania as the majority correctly notes requires appellant, Westinghouse Electric Corporation, to pay a tax "upon each dollar of net income . . . received by . . . and accruing to" the appellant. The foreign taxes paid by the appellant can not possibly be said to have been *received by or to have accrued* to appellant.

The majority states that the sole inquiry is whether the foreign taxes were treated as taxable income on appellant's Federal return. This is not the issue. It is true that the Pennsylvania statute defines "net income" as being the same as "taxable income" on the Federal return. The term "net income" in the Pennsylvania statute is, however, modified by the words *received by and accruing to.* Thus, the Pennsylvania law says that all of the appellant's taxable income for Federal purposes *received by and accruing to* the appellant is taxable in Pennsylvania.

If we are realistic, and successfully escape the semantics game, the amount of foreign taxes paid by the

appellant were not *received by and did not accrue to* appellant

The appellant, as the majority notes, could have properly deducted the foreign taxes on its Federal return. Federal law, however, allowed the appellant to take these foreign taxes, if it chose, as a tax credit rather than a deduction. This does not change the fact that the money paid for foreign taxes was an expense of doing business that was paid out in the same manner as foreign labor costs or foreign material costs.

The Pennsylvania law does not say that one is to be penalized simply because a choice was made *under Federal law* for *Federal tax purposes* to treat foreign tax payments as a tax credit rather than a deduction.

The appellant should be entitled to deduct the foreign tax payments in arriving at its net income upon which *Pennsylvania taxes* are due.

I emphatically dissent.

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

[Caption Omitted]

PETITION OF THE APPELLANT WESTINGHOUSE ELECTRIC CORPORATION FOR REARGUMENT

To the Honorable, the Justices of Said Court:

Westinghouse Electric Corporation, appellant in the above-captioned appeal, respectfully petitions Your Honorable Court for reargument of the issues involved in said appeal, and for reconsideration of the conclusions and rulings contained in the Majority Opinion of this Court filed April 28, 1978 by Mr. Justice Larsen. The appellant further avers that such reargument should be granted for the following reasons:

1. The Majority Opinion in construing the Corporate Net Income Tax Act ignored the fact that the tax base is ". . . each dollar of net income of such corporation received by, and accruing to, such corporation." The definition of "net income" as ". . . taxable income . . . as returned to and ascertained by the Federal Government . . ." supplies only part of the base. The Majority Opinion thus eliminates one half of the tax base by focusing solely on the definition of net income.

2. The Majority Opinion erroneously concluded:

> "Thus, in determining whether appellant's foreign taxes should be considered as part of "net income" (and hence subject to the state corporate net income tax), our sole inquiry is whether the amount of said foreign taxes was included as 'taxable income' on appellant's Federal return."

If the sole inquiry is whether a given figure is included in taxable income on appellant's Federal return, the further requirement of the Act that the income be received is ignored and effectively eliminated. An option given taxpayers in the Federal tax structure unconstitutionally distorts the income tax liability of Pennsylvania corporations earning foreign income.

3. The Majority Opinion erroneously rejected appellant's argument that it has been denied equal protection of the laws contrary to the 14th Amendment to the United States Constitution, and in violation of the uniformity clause of the Pennsylvania Constitution in that it is a demonstrable fact that a corporation deducting foreign taxes for Federal income tax purposes is taxed at a lower rate than corporations claiming a credit for foreign taxes on a Federal return.

4. The Majority Opinion misstates appellant's position with respect to the discriminatory application of Taxing Memorandum No. 83 when it states as follows:

> "In the case at bar, appellant does not challenge the Commonwealth's assertion that the policy enunciated in Taxing Memorandum No. 83 was applied uniformly during the period of time that the Memorandum was in effect."

Taxing Memorandum No. 83 was in effect from March 10, 1972 to April 11, 1973. Appellant's Petition for Refund was properly filed with the Board of Finance and Revenue on May 5, 1972 while Taxing Memorandum No. 83 was in effect. If, as the Majority Opinion concludes, Taxing Memorandum No. 83 was applied uniformly during the period of time that the Memorandum was in effect, the Board of Finance and Revenue should have granted the refund with respect to taxes paid or withheld on foreign source income. The situation is to the contrary. While as a matter of announced taxing policy the Department of Revenue and the Board of Finance and Revenue was allowing the deduction to all other taxpayers, appellant was deliberately and arbitrarily denied similar treatment. This is "deliberate, purposeful discrimination."

5. The Majority Opinion misunderstands the events relating to the stipulations granting the deduction for taxes on foreign source income to Coca Cola Company and H. J. Heinz Company. The majority opinion states:

> "In positing this argument, appellant ignores the fact that the two corporations received their deductions as part of out-of-court settlements reached between the Commonwealth and the corporations."

The stipulations were not negotiated settlements where mutual concessions are made by each side in recognition of the hazards of litigation.

H. J. Heinz Company and Coca Cola Company were allowed these deductions as the result of stipulations for judgment entered into by the Department of Justice through its Deputy Attorney General, Eugene A. Anas-

tasia. It was stipulated in the record of this case that "the question of the deductibility of foreign taxes . . . was the sole and only issue in the four cases of *Commonwealth of Pennsylvania v. Coca Cola Company* . . . and on May 13, 1975, a Stipulation for Judgment was entered in all four cases in favor of the Coca Cola Company and against the Commonwealth." (Stip. 16, R. 23a)

With respect to H. J. Heinz Company, it was stipulated, "the sole and only questions—(deductibility of foreign taxes) . . . was raised in the matter of *Commonwealth of Pennsylvania v. H. J. Heinz Company* . . . and on June 30, 1975 a Stipulation for Judgment was filed in favor of the H. J. Heinz Company and against the Commonwealth . . . " (Stip. 17, R. 24a)

These stipulations for judgment were part of the Commonwealth Court proceedings and terminated the litigation *totally* in favor of Coca Cola Company and H. J. Heinz Company, without concession on their part, there being no other issues in these cases. This action by the Department of Justice was the deliberate granting of a tax benefit to two corporations identically situated to appellant and cannot be explained away as isolated mistakes. Rather, these stipulations recognized that during Taxing Memorandum No. 83's existence, foreign taxes had been allowed as deductions for the same tax years.

6. The Majority Opinion misconstrues Section 3420(h) of the Corporate Net Income Tax Act when it states as follows:

> "Under Section 3420(h) of the Act, the Commonwealth had the power to enter such tax settlements with corporations."

In fact, Section 3420(h) does not delegate the authority or power to the Department of Justice to favor one corporation as opposed to another in determining tax liability. Section 3420(h) of the Corporate Net Income Tax Act provides that all taxes due shall be "settled" by the Department, and such settlement shall be subject to audit and approval by the Department of the Auditor General. This Section of the Act refers to the taxing process in the administration of the statute imposing taxes on corporations in Pennsylvania. The word "settle" is a term of art, and refers to the computation of the corporation's tax liability by a taxing officer subsequent to the filing of the return. For example, the "settlement" referred to in Section 3420(h) received by appellant following the filing of its 1969 Pennsylvania Capital Stock—Loans and Corporate Net Income Tax Report is set forth as Exhibit D of the Stipulation of Facts R. 38a. Reference thereto indicates that the settlement is a mathematical computation of tax liability based on the return as filed, made by the Department of Revenue and approved by the Auditor General.

In no way can this mathematical administrative function be construed to vest authority in the Department of Justice arbitrarily to exclude appellant from the same tax treatment that other corporations were given uniformly as a matter of state taxing policy.

7. Your Honorable Court is respectfully urged to consider that the effect of the Majority Opinion is to give the Department of Justice of the Commonwealth unrestricted authority to favor one litigant over other litigants in state tax cases without constitutional restraint, or judicial supervision, to the ultimate detriment of every other

taxpayer in this Commonwealth whose proportionate share of the tax burden must increase thereby.

Accordingly, for the reasons advanced in the foregoing Petition, in the Brief for the appellant and in the Dissenting Opinion of Mr. Justice Manderino, a reargument should be granted to the Appellant in the above appeal.

Respectfully submitted,
Howell C. Mette,
Shearer, Mette & Woodside,
Attorneys for Appellant.

APPENDIX F

ORDER OF PENNSYLVANIA SUPREME COURT ON APPELLANT'S PETITION FOR REARGUMENT

"May 31, 1978

Denied.

Per Curiam"

APPENDIX G

NOTICE OF APPEAL

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1353 C.D. 1975

Commonwealth of Pennsylvania

v.

Westinghouse Electric Corporation

Appellant

Appeal From the Order of the Board of Finance and Revenue

Docket No. C-38344

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Westinghouse Electric Corporation, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final

order and judgment of the Supreme Court of Pennsylvania, dated April 28, 1978, Petition for Reargument denied per curiam May 31, 1978, upholding the disallowance to Appellant of a deduction on its 1969 Pennsylvania Corporate Net Income Tax Report for foreign taxes paid during the taxable year, and the validity of the Pennsylvania Corporate Net Income Tax Act of May 16, 1935, P.L. 208 §1 et seq *as amended*, 72 P.S. 3420(a) et seq as applied to Appellant.

This appeal is taken pursuant to the United States Code Title 28 Section 1257(2).

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Filed July 11, 1978